

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

THE HON. THOMAS M. COFFIN, JUDGE PRESIDING

RONDA MCGOWAN, Personal )  
Representative for the Estate of )  
Brian Babb, through his Guardian )  
Ad Litem, STEPHANIE WOODCOCK, and )  
KAYLEE BABB, )

Plaintiffs, )

v. )

No. 6:17-cv-00424-TC

WILL STUTESMAN, OFFICER GROSE, )  
OFFICER PIESKE, Sgt. MCALPINE, )  
CITY OF EUGENE, a municipal )  
subdivision of the State of )  
Oregon, JANE DOE CALL TAKER, John )  
and Jane Does 1-10, )

Defendants. )

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EUGENE, OREGON

FRIDAY, JANUARY 18, 2019

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## PROCEEDINGS

FRIDAY, JANUARY 18, 2019

THE CLERK: Please be seated.

Now is the time set for Civil Case No. 17-424,  
McGowan, et al. versus Stutesman, et al. for oral argument.

THE COURT: All right. Good morning, everyone.

MR. VOLPERT: Good morning.

MR. ODIM: Good morning.

MR. STROTH: Good morning.

MR. FRANZ: Good morning.

THE COURT: You might introduce yourselves because  
I don't know all of you.

MR. ODIM: Your Honor, my name is Carlton Odim,  
one of the counsels for the plaintiff.

I have a motion pro hac vice which was filed a day  
ago -- Wednesday, and I will be asking the court to allow me  
to proceed to make the arguments on behalf of the plaintiff  
even though that motion has not been ruled on.

THE COURT: Very well. Welcome. And I will grant  
the motion and you may make your argument.

MR. ODIM: Thank you.

MR. STROTH: Your Honor, Andrew Stroth, counsel  
for the plaintiff with Action Injury Law Group in Chicago.

MR. VOLPERT: And Tim Volpert, local counsel for  
the plaintiff.

10:03:02

1 THE COURT: All right.

2 MR. STROTH: We also -- Your Honor, our client is  
3 also here with us today, the Babb family.

4 THE COURT: Okay. You can introduce them.

5 MR. STROTH: Mr. Lee Babb, the father; Kaylee  
6 Babb, daughter; Stephanie Woodcook, former -- ex-wife; and  
7 Stephanie Babb, sister of the decedent.

8 THE COURT: Very well. Thank you.

9 MR. FRANZ: Yes, Your Honor. Robert Franz for the  
10 defendants.

11 This is Sarah Henderson. She is an associate in  
12 my office. She will be assisting with the video. And  
13 defendant Will Stutesman.

14 MR. STUTESMAN: Stutesman, Your Honor.

15 THE COURT: Very well. Thank you.

16 MR. FRANZ: Stutesman.

17 THE COURT: I understand we are having some  
18 technical problems.

19 Is that -- have they been rectified?

20 THE CLERK: Not quite. There will just be a  
21 delay, as I need to message Dan and he changes it from the  
22 background.

23 THE COURT: Do you know how long it will take?

24 THE CLERK: Just maybe 30 extra seconds.

25 THE COURT: Oh, okay. Apparently it's not that

10:03:55 1 long, less than a minute.

2 So how do you wish to proceed here today?

3 This is the defendants' motion for summary  
4 judgment, so they typically go first. But I think that you  
5 wanted to make a presentation on video, and that apparently  
6 is not up right now.

7 MR. FRANZ: No. It should -- the video is  
8 working, right?

9 THE CLERK: Yes. Just if we need to change it at  
10 all, Dan has to change it in the background. I can't --

11 THE COURT: Okay. Do you wish to proceed with  
12 that first or do you wish to proceed with the plaintiffs'  
13 motion to reopen discovery?

14 MR. FRANZ: Your choice.

15 THE COURT: I have no preference, so I am asking  
16 you folks.

17 MR. FRANZ: Okay. We can go --

18 MR. ODIM: Well --

19 MR. FRANZ: Go ahead.

20 MR. ODIM: I hope you don't mind my sitting. Is  
21 it appropriate for me to sit?

22 THE COURT: I don't mind. In fact, it's better if  
23 you sit because of our sound system.

24 So Mr. Franz, so, yeah, please, everyone, remain  
25 seated. I know that's not customary in most courts, but our

10:04:57 1 sound system works much better if you are seated.

2 MR. ODIM: So the plaintiff would prefer to move  
3 forward with the motion for sanctions and discovery to the  
4 extent that the ruling on that motion may affect what  
5 Mr. Franz is allowed to present to the court today.

6 THE COURT: Well, in terms of those motions, let's  
7 take the motion to reopen discovery first. And I don't  
8 intend to deal with sanctions today.

9 MR. ODIM: Okay.

10 THE COURT: But I do think that the motion to  
11 reopen discovery needs to be addressed, and so you may go  
12 ahead.

13 MR. ODIM: Without repeating the substance of what  
14 is in writing, plaintiffs' concern is that -- is to avoid  
15 being sandbagged. Photographs which were in the defense  
16 possession which the defense knew about which the plaintiff  
17 asked for were never turned over to the plaintiff. I will  
18 only use --

19 THE COURT: Well, they weren't turned over until  
20 recently.

21 MR. ODIM: That's correct, until the plaintiff had  
22 responded to the motion for summary judgment, and those  
23 photographs were turned over and turned over in a -- in a  
24 dark way in the sense that we have no idea the author of the  
25 photographs. We were told that there were four authors,

10:06:36 1 four people who took these photographs. The photographs  
2 were not indexed to any of those four individuals. We had  
3 not known the identity of three of those individuals prior  
4 to that late disclosure.

5 Furthermore, we were not informed whether or not  
6 the set of photographs that are allegedly attributable to  
7 Officer DeWitt is complete; that is, did Mr. Franz just  
8 submit seven photographs and DeWitt took 50. If that's the  
9 case, what do the 50 that he didn't disclose show?

10 Now, this is an adversarial process, and we are  
11 not entitled to take on good faith words that opposing  
12 counsel gives us. Unfortunately, opposing counsel hasn't  
13 given us any words in answer to that question about whether  
14 or not he submitted a smaller subset of the whole set of  
15 photographs DeWitt took.

16 I sent him an e-mail and he didn't respond to it.

17 THE COURT: You want to reopen discovery to take  
18 the depositions of those who took the photographs?

19 MR. ODIM: Those four and to get a full disclosure  
20 of the photographs that were taken by each of the four,  
21 identified with each of the four, access to the camera that  
22 was used by DeWitt to take the photo. We understand that  
23 camera came from Officer Stutesman.

24 We'd like all of that as part of the reopening and  
25 limited to -- just limited to the issue of the photographs

10:08:28 1 and the people who took them.

2 THE COURT: Okay.

3 MR. FRANZ: Okay. So let's start from the  
4 beginning.

5 THE COURT: I have read your response. Go ahead.

6 MR. FRANZ: Okay. So --

7 THE COURT: Why is the city reluctant to allow  
8 this discovery that's being asked for?

9 Well, I am not here to play the blame game. Okay,  
10 Mr. Franz?

11 MR. FRANZ: Yeah. What --

12 THE COURT: Let me finish.

13 But what seems vital to this court is that  
14 plaintiffs have a full opportunity to explore all the  
15 evidence that's pertinent to the issues in this case. And  
16 certainly these photos are germane to the issues in the  
17 case, are they not?

18 MR. FRANZ: Yes.

19 THE COURT: Then why is the city reluctant to  
20 allow the reopening of discovery to allow that to occur?

21 MR. FRANZ: Well, first of all, let me go through  
22 the facts.

23 Are you looking at the monitor?

24 THE COURT: I am not looking at it. I am looking  
25 at you.



10:09:34 1 MR. FRANZ: Okay. Can you see what's on the  
2 monitor?

3 THE COURT: I see what's on the monitor.

4 MR. FRANZ: Okay. So I just want to show which  
5 photographs we are talking about. Okay?

6 So this is the BearCat video.

7 THE COURT: Okay.

8 MR. FRANZ: And you can see DeWitt taking  
9 photographs.

10 THE COURT: Yes.

11 MR. FRANZ: Okay.

12 THE COURT: Doesn't this go to the issue of the  
13 summary judgment, though?

14 MR. FRANZ: Well, no. It goes to the photographs.  
15 These are the -- the photographs -- he's taking a camera,  
16 taking a picture of everybody.

17 THE COURT: Okay.

18 MR. FRANZ: Okay? Those are the photographs we  
19 are talking about. Okay?

20 THE COURT: These are the photographs that were  
21 disclosed belatedly?

22 MR. FRANZ: Yes.

23 Okay. So those are the photographs that everybody  
24 knew existed because they had this video before the lawsuit  
25 was filed. Everybody knew they existed.

10:10:22 1 THE COURT: When you say "everybody knew they  
2 existed," existed where? They weren't disclosed  
3 until belatedly.

4 MR. FRANZ: Okay. But everybody knew that they  
5 had been taken. They were in all the police reports,  
6 everything. All right?

7 Now, this is before I come in. The lawsuit's  
8 filed. Okay? And now -- and I get an e-mail. We have the  
9 motion for summary judgment conferral, and I am on the  
10 telephone with these gentlemen, ready to go for motion for  
11 summary judgment. We file our motion for summary judgment.  
12 We did not use the photographs at issue because I didn't  
13 even know they existed at that time.

14 So they then -- their due date for their motion is  
15 like on a Wednesday, and that Friday Mr. Odum sends me an  
16 e-mail saying he requested the photos.

17 He then goes ahead and files his response. I then  
18 contact the city because I didn't know of the photos. I  
19 contact the city. What about these photos? They said, we  
20 have them. I said, do you know if they were disclosed. No.  
21 So I put them on a CD and sent them to Mr. Volpert. I then  
22 filed our response.

23 Now, I agree and now in the deposition of DeWitt,  
24 Michelle Burrows is taking the deposition of Mr. DeWitt, and  
25 she said, I noticed in the reports that you took photos.

10:11:59 1 Yes, I did. And he describes the photos he takes.

2 And then she says to Jeff Matthews, I don't think  
3 we have those. Will you check.

4 Okay. Counsel is then substituted. I don't hear  
5 anything about photos. I don't even have them. And I  
6 didn't even use them in our initial motion for summary  
7 judgment.

8 He contacts me. He doesn't contact me until  
9 December after I filed my reply. And then he said, I think  
10 both him and Andrew said, we don't have these photos. The  
11 first time we saw them is in your reply.

12 And I said I sent them to Mr. Volpert.

13 And they said, well, he doesn't have them.

14 And so I said, okay. They set up a Dropbox for me  
15 and I sent them to them.

16 Now, we didn't -- then I attached them. I have no  
17 problem with them having the photos.

18 THE COURT: With them having the photos, but you  
19 refuse to allow -- to agree to them reopening discovery.  
20 You said discovery was closed in your e-mail.

21 MR. FRANZ: They wanted me to withdraw my motion  
22 for summary judgment and reopen discovery and I refused. I  
23 wasn't going to withdraw the motion for summary judgment.

24 The --

25 THE COURT: You were asked to withdraw the motion

10:13:16 1 for summary judgment to reopen discovery.

2 MR. FRANZ: Well, that's what they requested.

3 THE COURT: Well, this court --

4 MR. FRANZ: I am fine if you want -- if it's  
5 limited to just those issues, Your Honor, then let's do it.

6 THE COURT: This court is not about to decide this  
7 case on a summary judgment basis without being assured that  
8 full and complete discovery into all germane evidence  
9 pertaining to this fatal use of force is allowed for the  
10 plaintiffs and, quite frankly, for this whole community.

11 And so that motion is going to be granted. And  
12 the court will order the reopening of discovery to allow  
13 inquiry into the photographs, the camera, et cetera, as  
14 requested by the plaintiff.

15 Having said that, I will also allow supplemental  
16 briefing after that discovery is closed of -- for each  
17 party.

18 I will not address the motion for sanctions at  
19 this time because it seems that that can come later after  
20 the discovery has been taken and after more facts are known  
21 and after we have another round of briefing.

22 MR. ODIM: May I ask in clarification of the  
23 court's order granting that plaintiff be allowed to submit  
24 no more than ten interrogatories that simply address these  
25 photographs so that we know in advance who took what?

10:15:15 1 THE COURT: Yes, you may.

2 MR. ODIM: And that the defense be directed to  
3 answer those interrogatories on an expedited basis within 14  
4 days of service.

5 THE COURT: Yes. I think it's appropriate to move  
6 this case along because there's been a number of delays in  
7 the case. I am not attributing fault to anybody. There's  
8 been changes in counsel on both sides. And so I want to --  
9 I want to basically accelerate this case and get it moving  
10 forward.

11 MR. ODIM: And lastly, Your Honor, may we also  
12 submit a request that the camera that was used by DeWitt and  
13 any other cameras that are in possession of the Eugene  
14 Police Department that were used to take any of the  
15 photographs that are disclosed be disclosed to us for  
16 inspection?

17 MR. FRANZ: I object to that. They can inspect it  
18 at -- well, first let's find out if it exists, and then they  
19 can inspect it at a location where we maintain the evidence.  
20 I don't want it mailed back to you guys.

21 MR. ODIM: No, we wouldn't do that.

22 THE COURT: You folks can work out a protective  
23 order, but it's my intent to allow them to inspect the  
24 camera that's involved in this.

25 MR. FRANZ: I do want to clarify one point. First

10:16:41 1 of all, the photographs do nothing but support our position.  
2 They are photographs of the rifle, and so it's to our  
3 advantage to have them. We wouldn't have withheld them if  
4 they would have just followed the request.

5 And second of all, Mr. Odum says that he does not  
6 know whether I put all the photographs in evidence.

7 THE COURT: Whether what?

8 MR. FRANZ: Whether I put all of the photographs  
9 in evidence in our reply or if I did not. And I told him  
10 over the telephone, I selected photographs because all of  
11 them were -- some of them gory but that all of the  
12 photographs did go to Mr. Volpert.

13 THE COURT: Okay.

14 MR. FRANZ: So I want to make the record clear  
15 that I did tell him that over the telephone.

16 MR. ODUM: Well, again, I am not casting  
17 aspersions, but when -- I am not entitled to take on the  
18 words of opposing counsel without independently verifying as  
19 a zealous advocate of my client, which is what I want to do.

20 THE COURT: I am allowing you discovery into that,  
21 into all these issues. You will have discovery into that.

22 Okay. Anything else on that issue?

23 MR. ODUM: Nothing from the plaintiff.

24 THE COURT: All right. Then let's proceed to your  
25 motion for summary judgment with the understanding that

10:17:50 1 after discovery on these other issues is conducted, I may  
2 have everyone back here for further -- after further  
3 briefing and for further oral argument.

4 MR. FRANZ: Okay. So let's -- I just want to  
5 briefly go backwards, then, before I get to those -- the  
6 photos.

7 I want to explain that we have two sources of  
8 audio that we have submitted. And one source is the  
9 computer WAV file that can be played by any program, and  
10 that's of the actual dispatch.

11 So the officers in the field and as they are  
12 driving to the scene are in radio contact with dispatch, and  
13 they can communicate with one another. So that's one source  
14 of the audio.

15 The second source of the audio is the in camera  
16 video of DeWitt. Now, Ms. Henderson has portions of the --  
17 of that audio, and that -- when I refer to that in our oral  
18 argument, that's Exhibit 108. And I just kind of want to  
19 explain that a little bit.

20 So here's -- the in camera video is on your  
21 screen, Your Honor.

22 This is DeWitt's patrol car. And, of course, if  
23 you just -- as he's sitting there, his camera is on.

24 THE COURT: Okay.

25 MR. FRANZ: And then -- this thing goes for two

10:19:35 1 hours, so I am not going to -- but I will just give you a  
2 brief. So, for example, so you see when he's driving to the  
3 scene you have constant sound. And also if you watch this  
4 entire video, you will hear dispatch -- okay.

5 Okay. So now, that sound you hear you will also  
6 hear on dispatch because dispatch is going to him.

7 So then when he gets to the scene, he will park  
8 his vehicle. Now, this situation, he just happened to park  
9 behind Stutesman. So that's Stutesman in that picture, and  
10 this is the in camera video. And you can see hear what they  
11 are saying as they are loading up, going to the scene.

12 All right. Now, that video, as you can see on the  
13 right-hand side, is elapsed time. There's eight minutes and  
14 37 seconds, and then it keeps going. When we refer to the  
15 video exhibit, we refer to elapsed time to try to guide  
16 people to that elapsed time.

17 All right. So as everybody is going to the scene  
18 and for the next couple hours that car is just parked behind  
19 a couple blocks away.

20 All right. So that's -- that's the first source  
21 of sound.

22 Then the WAV file, and to give you an example,  
23 when DeWitt goes to the scene, he goes to where the BearCat  
24 is eventually parked.

25 So just kind of as a reminder, this is the scene.



10:21:24 1 It's a Google map, so it's not super accurate. I mean, it's  
2 not the time, but you can see the house of Babb is in the  
3 background. And then you can see, here's the fences that  
4 the BearCat eventually goes through, and the BearCat  
5 eventually will be sitting right there.

6 This was just a diagram used throughout. Another  
7 Google map. It's not reflective of the actual day, but this  
8 is marked as Exhibit 105C in the deposition. Shows various  
9 officers. You will see Barnes and Farley. Clark and Warden  
10 are in the back. You can see the Babb house; has the two  
11 cars parked in front of it. So Clark and Warden are behind  
12 the fence.

13 Kidd is drawn on top of the roof. He's on the top  
14 of the roof of that house.

15 The BearCat is just put in there, and it had  
16 McAlpine, Vinje, Stutesman, DeWitt, Grose, and Pieske.  
17 Pieske was the driver of the BearCat. Grose was sitting in  
18 the passenger seat, and he was -- he was the one doing the  
19 hailing. Okay.

20 (Video played; not reported.)

21 MR. FRANZ: Okay. So where that sound is coming  
22 from, it's coming from the in camera video of DeWitt, which  
23 is parked blocks away, and DeWitt has the microphone on. So  
24 DeWitt's at the back. Oh, that's Grose. So DeWitt's at the  
25 back of the BearCat. Grose is in the passenger seat doing

10:23:27 1 that hailing. DeWitt's microphone is picking that up. So  
2 that's where that source is coming, and the hailing is heard  
3 intermittently.

4 So sometimes you can hear stuff and sometimes you  
5 can't because it just depends on how that signal is being  
6 transferred from the IC unit of DeWitt to his microphone.

7 So, for example -- can you go to shots fired.

8 So we have the hailing that's taking place. So if  
9 you go to the various elapsed places that we have referred  
10 to in our motion, you will hear hailing every once in a  
11 while, and you will hear -- actually, let's go to the --  
12 he's armed because I think we had that next.

13 So we have the interplay of the officers over  
14 dispatch, the WAV file, and we have the IC unit. And you  
15 have to -- we went to elapsed time so you don't have to  
16 listen to it for two hours.

17 Now, the second source, as I said, is the WAV  
18 file, and that file is actual dispatch. So that file would  
19 start out --

20 (Played video; not reported.)

21 MR. FRANZ: Okay. So that's the computerized  
22 voice of dispatch. That would be actual communication  
23 between the officers.

24 So, for example, we know from the briefing that  
25 Mr. Antonini was in the house. And he was referred to as

10:25:04 1 the person in the house with Babb. He comes to the door and  
2 puts his hands up because he heard the hailing. So he comes  
3 to the door, and he's walked out safely to the back of the  
4 BearCat.

5 So you will hear the dispatch of what is being  
6 said about what Mr. Antonini is saying.

7 So give an example of that.

8 (Video played; not reported.)

9 MR. FRANZ: Okay. So that -- go ahead.

10 (Video played; not reported.)

11 MR. FRANZ: Okay. So now, that's from the  
12 dispatch tape. So when we refer to that, we refer to that  
13 as Exhibit 103.

14 So you can go through the combinations of the  
15 dispatch tape, the IC video to get up to the time of the  
16 shooting.

17 And when you do that, we set that out in our  
18 memorandum, the fact -- how many times Brian came to the  
19 door. We did elapsed time for you showing the roommate  
20 being -- coming out of the house, coming back to the back of  
21 the BearCat. That shows up on the video.

22 The third source of information is the BearCat  
23 video. So the BearCat video, when it got to the scene,  
24 starts running. And you can see the various -- you can see  
25 the fence. You can see some of the front door. Up at the

10:27:21 1 right-hand bar is where you can -- you can move this around,  
2 you know, to various positions.

3 Now, that has an elapsed time on that of 13:58.  
4 So that means that if you went back to the very beginning,  
5 you would see when the BearCat got there, and then you can  
6 see the elapsed time of that one is 15:38.

7 We actually could -- you know, you could actually  
8 go all the way back and start it and then you just play it.  
9 It has no sound so you can hear Babb. You can fast-forward  
10 it as fast as you want to pick up anything in between.

11 And so you will get -- you will get the various  
12 sequences. I saw him walking out. I was going to try to  
13 find that again, but.

14 Okay. So right here is Jim Antonini coming out of  
15 the house that he has been talked out. So the BearCat video  
16 picks him up walking to the back.

17 You will notice that the front door is open. And  
18 so then you can trace through how long that front door  
19 opens, and you can combine that with the audio on the WAV  
20 file, and you can hear the comments. And some of it is  
21 picked up on the ICV. So that door stays open, and then you  
22 will see -- I can kind of fast-forward there. Then it  
23 closes.

24 Okay. So we know at elapsed time 15:37, okay,  
25 right there the door opened. So I will just go back a

10:30:26 1 little bit. The door is closed. Door opens.

2 Okay. Now, from studying the IC -- I mean, from  
3 studying the BearCat, that's the last time the door opens.

4 Okay. Now, to switch to what -- we don't know  
5 exactly how long that door is opened before the shots were  
6 fired, but we know it's very close.

7 So go to shots fired.

8 (Counsel conferred.)

9 (Video played; not reported.)

10 MR. FRANZ: Okay. So you heard, drop it, drop it  
11 and then the gunshot. That's coming from DeWitt's  
12 microphone, going back to his patrol car and coming over the  
13 air.

14 Okay. Now, we also --

15 THE COURT: When you say that's coming from  
16 DeWitt's microphone, that's the audio is coming?

17 MR. FRANZ: Yes.

18 THE COURT: Not the words drop it, drop it.

19 MR. FRANZ: Right.

20 THE COURT: That's coming from some other --

21 MR. FRANZ: That's Stutesman.

22 THE COURT: Yes.

23 MR. FRANZ: Yeah. The mike is just on. That's --

24 THE COURT: I just wanted to clarify that's not  
25 DeWitt, that's --

10:31:41 1 MR. FRANZ: That's -- yeah. That's Stutesman  
2 saying, drop it, drop it, but it's being conveyed over the  
3 microphone of DeWitt, who is in the BearCat.

4 All right. We also have the -- we also have the  
5 shots fired on the dispatch tape.

6 So do you have that?

7 (Video played; not reported.)

8 MR. FRANZ: Okay. So that was the description, I  
9 think it was from Vinje, as to the location of Mr. Babb.  
10 And then you heard the shot. Now, that source of audio is  
11 from the WAV file.

12 All right. So now we know that the shots have  
13 been fired and at a certain point.

14 Okay. The BearCat video will sit there for six  
15 minutes and three seconds. And so if we ran this for six  
16 minutes and three seconds, we'll see the BearCat is still in  
17 this same position.

18 In the meantime --

19 THE COURT: You acknowledge that the BearCat video  
20 does not show a rifle at this time?

21 MR. FRANZ: It doesn't show a person. At this  
22 time it doesn't --

23 THE COURT: It doesn't show a person firing. All  
24 right.

25 MR. FRANZ: Yeah. It shows exactly what you see.

10:33:03

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THE COURT: Okay.

MR. FRANZ: Yeah. And that shows an open door.

Okay. So it sits at this position for six minutes and three seconds.

Okay. And then we can go to elapsed time 21:40.

Okay. So -- well, that was a little bit --

Okay. Not 21:40. 20:40. So there we are at elapsed time 21:37.

The door opened at elapsed time 15:37. So if I take the time that the door opened for the last time --

THE COURT: And then shortly thereafter there's the shot.

MR. FRANZ: Right. And then it sits there to elapsed time 21:40 or 20:40, and that's six minutes, three seconds.

And then we can see that the BearCat is starting to move.

THE COURT: Okay.

(Video played; not reported.)

MR. FRANZ: Okay. So you can see it's going through the fence at 21:40.

You can see down here the rifle. The plaintiff causes a shadow at the left-hand side where my mouse is. It's our position that's the rifle.

THE COURT: It's your position that's the rifle.

10:35:54 1 MR. FRANZ: Right.

2 THE COURT: Is that disputed?

3 MR. FRANZ: Yes. They say that's not a rifle.

4 THE COURT: Are you contending that that's not a  
5 disputable issue?

6 MR. FRANZ: Well, I don't think it's a disputable  
7 issue, but I can tie it -- we see it -- we see a rifle.

8 THE COURT: Am I supposed to decide that as a  
9 matter of law?

10 MR. FRANZ: Well, let's say -- you won't need to  
11 based upon the other evidence. So let me just go through  
12 this and I will explain that other evidence.

13 THE COURT: Okay.

14 MR. FRANZ: Then you can see it again.

15 Okay.

16 Then the BearCat video sits there for another two  
17 hours. Okay. For that two-hour period, you will see people  
18 go in and out, medics go in and out.

19 And if I fast-forward it a little bit, you know,  
20 to speed it up, you can see the police approach.

21 If you kept going, you know, you would see the  
22 medics show up. There's the medics.

23 And then eventually we get to the -- now, we --  
24 now, this is where we have DeWitt, who is going through  
25 there taking photographs.



10:37:50

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THE COURT: Which one is Mr. DeWitt?

MR. FRANZ: Right there with your back to it. His right hand is up.

THE COURT: Okay.

MR. FRANZ: And you will see the camera when he -- he will come around.

This is 11 minutes after the door opened for the last time.

And then these are the photographs that were recently produced that DeWitt's taken.

And then the photographs that were produced will show the various -- it shows the various angles that he actually took photos.

So he walks to the right there to take photos.

And then we had attached some, but we didn't attach the ones that showed the body.

These are the photos that we produced that show what DeWitt was taking a picture of.

And then he has some of the inside.

Now, the position that they set forth in their legal memorandum is that Officer Warden planted the rifle and that we know that you have evidence from Stutesman, drop it, drop it.

So to believe the weapon was planted, you would have to believe that Stutesman just made that up. He was

10:40:13 1 telling him just to drop it; that in the split-second that  
2 that happened, he was just making it up. That there was  
3 nothing for Mr. Babb to drop. We have his testimony that  
4 the rifle was pointed at him.

5 THE COURT: Let me stop you right there.

6 Is it your position that if Mr. Babb just  
7 possessed a rifle that that merits summary judgment on  
8 your -- in your favor on the use of deadly force?

9 MR. FRANZ: Yes.

10 THE COURT: Even if he did not point it at Officer  
11 Stutesman?

12 MR. FRANZ: Yes, under these circumstances.

13 THE COURT: Even if he did not point it at Officer  
14 Stutesman?

15 MR. FRANZ: Yes, because of the circumstances.  
16 The circumstances are that he fired a weapon before, shot a  
17 hole in the ceiling. So the officers knew that he had fired  
18 a weapon and it had been shot.

19 We knew from -- he was agitated, obviously, and we  
20 have the dispatch language of the words he said.

21 We knew he was --

22 THE COURT: Before you get down that litany of  
23 justifications, I want to know if it's your position that  
24 any time a suspect possesses a weapon that that in and of  
25 itself justifies the use of fatal force.

10:41:45 1 MR. FRANZ: No. You would have to have some other  
2 circumstances.

3 THE COURT: So it's possessing a weapon plus other  
4 circumstances?

5 MR. FRANZ: Well, it depends on how you talk about  
6 possess and possessing --

7 THE COURT: Certainly, one other circumstance  
8 would be pointing the weapon --

9 MR. FRANZ: Yes.

10 THE COURT: -- at the officer.

11 And -- but is it your view that that is  
12 indisputable? That he -- whether he pointed the weapon at  
13 Officer Stutesman or not, are you saying that that itself is  
14 not subject to being disputed?

15 MR. FRANZ: It's subject to being disputed, but it  
16 is --

17 THE COURT: If it is subject to being disputed,  
18 doesn't that implicate a factual controversy?

19 MR. FRANZ: Well, it has to be disputed, though.  
20 Just the fact that something is subject -- what's the  
21 dispute?

22 THE COURT: But if it's disputed, doesn't that  
23 implicate a factual controversy, and, if it does, doesn't  
24 that require a jury to resolve that factual issue?

25 MR. FRANZ: No.

10:42:47 1 THE COURT: You want me to do it as a matter of  
2 law?

3 MR. FRANZ: Based on the evidence you have. You  
4 have to have evidence -- if he possessed a weapon coming  
5 out, they don't have to wait for him to pick it up and shoot  
6 somebody.

7 THE COURT: Is it your position that Officer  
8 Stutesman's statement that the rifle was pointed at him is  
9 not subject to being probed, for example, by  
10 cross-examination and other circumstances and is not subject  
11 to being disputed by the plaintiffs?

12 MR. FRANZ: With evidence. If you had a witness  
13 that said he came to the door and didn't point the weapon.

14 THE COURT: Well, what about -- what about  
15 cross-examination? What about casting doubt on the  
16 statement through the traditional means of examining the  
17 witness at a trial?

18 MR. FRANZ: They had the opportunity to do that at  
19 deposition.

20 THE COURT: And you are saying nothing came out at  
21 deposition that would allow a jury to find a factual issue?

22 MR. FRANZ: Correct.

23 THE COURT: Okay. Go ahead.

24 MR. FRANZ: Okay. So their position is that the  
25 weapon was planted and that that weapon wasn't there.

10:44:07 1 Now, we have the neighbors' testimony, and her  
2 testimony is, and she -- her testimony is that he came to  
3 the door and she saw the strap to the gun.

4 THE COURT: Here's what she said:

5 "We saw the shoulder strap of the gun -- well, of  
6 something. I don't know if it was a gun, but a shoulder  
7 strap of something."

8 Is that not subject to a factual issue for a jury  
9 to resolve? What did she see?

10 MR. FRANZ: You have to have some evidence that  
11 there's some contrary evidence. You just can't say you have  
12 a right to credibility. The fact -- the disputed fact -- a  
13 dispute of a material fact, where is the dispute? What  
14 evidence? You have a neighbor see a strap. You have  
15 Stutesman say there's a weapon. You have a weapon on the  
16 ground. And nobody came out or in that house once that  
17 BearCat got there because you had the BearCat video the  
18 entire time. The gun did not walk there.

19 THE COURT: I don't know if you are aware or not,  
20 but as a prosecutor for many years, I tried hundreds of  
21 cases in front of a jury, and I cannot emphasize enough the  
22 value of cross-examination in terms of the probity of  
23 evidence.

24 I had one particular case that involved a rape  
25 homicide at the border, and the issue was who committed the

10:45:58 1 rape and the homicide. The defendant was a federal  
2 protective officer. And one of the issues was where the  
3 body had been placed after it had happened. And there was  
4 testimony from other federal protective officers that they  
5 had been at the scene patrolling and there was no body there  
6 at a certain pertinent time. And the issue was whether that  
7 officer was correct in that statement or whether he just  
8 didn't see it, and that was the subject of cross-examination  
9 at trial. And there was doubt cast on the accuracy of his  
10 testimony.

11 I could cite you thousands of examples.

12 So I -- it's not -- it's not for me lightly to  
13 dismiss the value of putting on a case before a jury and  
14 allowing full cross-examination to allow the testing of a  
15 witness's statement.

16 And you are asking me to do that at summary  
17 judgment. You are asking me to take it from a jury and just  
18 to decide it as a pure matter of law.

19 That's the context of this hearing here today, and  
20 that's exactly what you are asking me to do, correct?

21 MR. FRANZ: No. I am asking you to find that a  
22 material fact is not in dispute.

23 THE COURT: Okay. Go ahead.

24 MR. FRANZ: Okay. So assuming that nothing is  
25 further disclosed after the photographs and that those

10:47:57 1 photographs are actually not fake or whatever the plaintiff  
2 is going to say, we know the weapon was there 11 minutes  
3 after.

4 Okay. Their theory is that Officer Warden jumped  
5 the fence of the backyard, came around, planted the gun;  
6 that he went into the house, he got the gun, he came out and  
7 planted it.

8 We know that once the BearCat video got there six  
9 minutes later no one came out of that house with a gun. So  
10 for Warden to have jumped the fence and planted the gun, he  
11 had to do it within the six minutes and three seconds that  
12 the BearCat sat there after the shot.

13 So what we have done is we have taken the audio of  
14 the dispatch tape.

15 And can you get to where he jumps the fence?

16 (Video played; not reported.)

17 MR. FRANZ: Okay. So that was Officer Warden  
18 calling Malcolm, who is Malcolm McAlpine, asking -- he said  
19 he's jumping the fence. Do you want me to come there and  
20 help you? And McAlpine said no. Go to the front.

21 Okay. So we know he's at the fence when that  
22 comment was made.

23 So we can calculate from shots fired to the time  
24 that that statement was made, and we know that the statement  
25 was made nine minutes and 15 seconds after shots fired on

10:49:41 1 the dispatch tape.

2 So we can take that nine minutes and 15 seconds  
3 and run it on the BearCat video from the time that the door  
4 last opened, and we can see where the BearCat video is at  
5 the time Warden jumps the fence.

6 And so by doing those calculations, elapsed time  
7 is 24:52.

8 Okay. So this is the scene nine minutes after  
9 when Warden jumped the fence. Okay? The BearCat video was  
10 already there when Warden jumped the fence.

11 So for their theory to be correct, the BearCat  
12 video would have to show Warden going into the house,  
13 getting the weapon, and already putting it down. And so  
14 Warden did not jump the fence and plant the gun.

15 So our theory and what we say the evidence shows  
16 is that the testimony of Stutesman is credible. You have  
17 excited utterance.

18 THE COURT: Well, when you say the testimony of  
19 Officer Stutesman is credible, does that mean it must be  
20 accepted and can't be subject to dispute? Is that what you  
21 are saying?

22 MR. FRANZ: No. If there is a fact --

23 THE COURT: Because I noticed in your briefing,  
24 you basically conflate the rules of admitting a statement as  
25 an excited utterance as an exception to the hearsay rule,



10:51:36 1 and you seem to basically equate its admissibility with the  
2 proposition that it must be accepted as true, and that's not  
3 an accurate statement of the law.

4 Excited utterance is admissible under the hearsay  
5 rule, but that doesn't take its effect away from the jury.  
6 They still must make the determination if they credit it,  
7 and if it's disputed, they can make that determination.

8 So it's not -- it's not binding on the court as a  
9 matter of law to accept an excited utterance as something  
10 that can't be controverted.

11 MR. FRANZ: I agree, Your Honor. I didn't mean it  
12 to be that way.

13 THE COURT: Okay.

14 MR. FRANZ: I meant if it is a credible statement,  
15 it has to be disputed by a material fact.

16 THE COURT: Okay.

17 MR. FRANZ: So, I mean, that's the issue. Is  
18 there a fact disputing the statement. Is there a fact  
19 disputing that the weapon was not there and carried out and  
20 is there a dispute of the fact that he didn't possess the  
21 weapon. Our position is possession of the weapon plus the  
22 extra facts.

23 THE COURT: Okay.

24 MR. FRANZ: That's what it boils down to.

25 Thank you.

10:52:53 1 THE COURT: All right. I will hear from the  
2 plaintiffs.

3 MR. ODIM: Counsel refers to the -- and has shown  
4 the court the video.

5 MR. STROTH: Can we take the video off the screen.

6 MR. ODIM: And rightly says that the video is  
7 running the whole time.

8 That video itself raises a material issue of fact  
9 about whether or not Babb came to the front door, raised a  
10 rifle, and pointed it at Stutesman. That video doesn't show  
11 any of that.

12 THE COURT: Do you agree with Mr. Franz that even  
13 if he didn't raise the rifle that fatal force was justified?

14 MR. ODIM: No.

15 THE COURT: Okay.

16 MR. ODIM: Mere possession is not enough under the  
17 appropriate authorities. There must be an objective and  
18 reasonable fear of an imminent threat to the officer or some  
19 third party.

20 In trying to think about how to compress the  
21 voluminous briefs and exhibits, I divided into two concepts  
22 the essence, I think, of plaintiffs' position. There is no  
23 doubt; that is, both sides agree that one or more of the  
24 Eugene officers said after the shooting that Babb is down.  
25 Rifle in right hand. We all agree to that.

10:55:02 1 The law of contradictions says that if one  
2 thing -- that two things can't -- two things in  
3 contradiction can't both be right. If a gun, a rifle was in  
4 Babb's right hand while he was down, then the pictures that  
5 defendants produce that show a rifle on the front porch not  
6 in Babb's right hand create a contradiction. What's  
7 correct? Which one is correct? Who gets to decide that if  
8 not the jury?

9 And the jury is entitled to raise inferences about  
10 the mere existence of the contradiction, especially the mere  
11 existence of the contradiction unexplained.

12 Defendants' reply to our response had attached to  
13 it a declaration by Officer Pieske. Officer Pieske says  
14 that he is the one speaking on the audio transmission saying  
15 that Babb is down. Rifle in his right hand.

16 Defendants make the implied argument that Pieske  
17 is wrong about that. Pieske was wrong when he said that.

18 Pieske's declaration was an opportunity for Pieske  
19 to explain why it is he was wrong. But that declaration is  
20 silent. Why?

21 I would put Pieske on the witness stand and have  
22 him answer a question in front of a jury, why did you say  
23 that the officer was down -- that Babb was down with a rifle  
24 in his right hand? To what end? For what purpose?

25 Second point, concept: If we accept that the gun

10:57:45 1 was not in Babb's right hand, as the photographs show, then  
2 you ask why did Pieske lie? It's a fair inference that can  
3 be drawn from that fact that it was a lie. It was an  
4 attempt at a cover-up.

5 The jury's entitled to hear from Pieske why does  
6 he say that.

7 Now, the defense misstates plaintiffs' position as  
8 a fair way of trying to take it down, misstate it and then  
9 take it down. Possession, planting the concept of  
10 possession inchoately, planting the concept that Babb had in  
11 his possession a weapon would suggest is why one of the  
12 officers, Pieske or others, used the phrase man down, gun in  
13 right hand.

14 Pieske is not the only one to use that phrase.  
15 McAlpine -- three officers used the phrase. Why? McAlpine  
16 in one of the event reports, at -- is recorded in the event  
17 report, which is what the dispatcher produces of traffic  
18 over the airways, is credited with saying man down --  
19 with -- rather, is credited with saying gun in right hand.

20 Plaintiffs' presentation describes Kidd as saying  
21 that.

22 Well, the Oregon State Police report says Kidd  
23 says that. Well, who said it? McAlpine, the supervisor on  
24 the scene; Kidd; or Pieske?

25 We know that Pieske could not have seen what he

11:00:00 1 said he saw. He was sitting in the BearCat. He couldn't  
2 have seen over the fence. He admits that himself.

3 These officers, plaintiffs suggest, were trying to  
4 create the cover story because they were conscious, they  
5 were conscious of a weakness. They were conscious of a bad  
6 shoot, to use the street lingo. They needed to shore up.  
7 They needed it in the records, gun in right hand.

8 Plaintiff is simply use -- we don't need to drag  
9 and regurgitate the Warden events to reach or answer the  
10 question whether there's a material issue of fact. But  
11 Warden simply shows that -- the Warden events simply show  
12 that there was someone who had access.

13 When did Warden jump the fence? Was it before he  
14 came on the airwaves? Was it three minutes before that? We  
15 don't know. He contradicts himself in his deposition. He  
16 says he went from the back to the front using a safe  
17 pathway, meaning he didn't jump into the backyard, meaning  
18 he didn't jump into the backyard because the -- he didn't  
19 know that the -- whether the house was clear, whether he  
20 would be shot.

21 So when he came to the front, he said he walked a  
22 safe pathway outside of the yard. When pressed at his  
23 deposition, he changed his version and said, yes, I did jump  
24 over the fence.

25 Now, is it that Warden moved to the rear -- or

11:02:05 1 moved from the rear to the front of the house twice and  
2 that's what the confusion was? He did it one time when he  
3 went to check the scene, went back to the fence, used the  
4 radio to get the recordation and then came up to the front?  
5 The jury needs to hear that.

6 Why is that gun not in Babb's right hand? Why did  
7 Pieske say it was when it wasn't?

8 The plaintiff is entitled to the inferences that  
9 there was a cover-up, that these officers together,  
10 together, again, remember three officers used the phrase,  
11 gun in right hand, these officers together were conscious of  
12 this bad shoot, were conscious of the need to shore up  
13 Stutesman's statement that the gun was raised.

14 That is the material fact. Was a gun -- was Babb  
15 in possession of a gun that presented an imminent threat to  
16 Stutesman.

17 Without cross-examination, without inquiry into  
18 the discrepancies between Pieske's statements, McAlpine's  
19 statements, Kidd's statements about this weapon, defendant  
20 is asking the court to simply take it on faith and as a  
21 matter of law that there is no dispute.

22 Plaintiff isn't required to prove a case in  
23 response to summary judgment. Plaintiff is only directed to  
24 raise, through inferences or otherwise, a material question  
25 of fact, not as counsel states, an evidentiary fact alone.

11:04:37 1 Inferences, inferences are the scaffolding of the  
2 plaintiffs' response here. And, of course, they would be.  
3 If somebody is covering up, they clean their tracks. You  
4 rarely find direct evidence. You rarely find direct  
5 evidence.

6 We don't know for sure whether or not Stutesman  
7 made a mistake, intentionally shot, but I think plaintiff  
8 has raised sufficient inferences on the material question of  
9 whether or not Babb possessed a gun and, in possessing that  
10 gun, pointed it or did something with it to put Stutesman  
11 and others in imminent, imminent fear.

12 I want to talk about -- now about the various  
13 audio and video that defense has raised.

14 He uses the phrase elapsed time. Elapsed time.  
15 Elapsed time. What about realtime? There is even a  
16 question about the timeline. We have three sets of sound --  
17 or three sets of data that have time stamps on them. They  
18 have realtime timestamps on them. Right?

19 What is the synchronicity between each of these  
20 three data sets? We don't know whether or not the time  
21 stamps, the realtime stamps actually reflect the actual time  
22 of day.

23 Counsel's presentation assumes that there's  
24 synchronicity across those three data sets. That's an  
25 assumption. There's no evidence of that.

11:07:18 1           Mere possession is not enough, Your Honor, and  
2           that video does not show possession. That video does not  
3           show a rifle pointed. And if we take counsel's argument at  
4           face value, what that video shows is that there is an  
5           unanswered question about the existence of a rifle in the  
6           right hand of Babb and the location of that rifle a little  
7           more than six feet away outside on the front porch.

8           It's not enough to say we don't have direct  
9           evidence, meaning someone who says he didn't point a gun.  
10          Stutesman took away the opportunity for that to happen.

11          And the authorities that we cite in our brief make  
12          it clear that in circumstances where an officer makes  
13          statements that support his version and the person who has  
14          testimony that could rebut it has been shot by the officer  
15          that the court ought to be very, very careful in accepting  
16          that one-sided presentation.

17          So to wind up, we think that the plaintiff has  
18          raised a material question of fact on the question of  
19          possession, and we would ask ultimately, once the  
20          supplemental briefing is done, that the court enter an order  
21          denying that motion and then setting this case for a jury to  
22          hear and decide what inferences to draw from the  
23          discrepancies that litter this record.

24                 Thank you.

25                 THE COURT: Thank you.



11:09:26 1 Well, just so everybody's on the same page, I want  
2 to make it clear that the law in federal court is well  
3 settled that circumstantial evidence is equally probative as  
4 direct evidence.

5 So in other words, circumstantial evidence being  
6 evidence from which inferences can be drawn leading to a  
7 certain conclusion, that that is entitled and always has  
8 been to equal weight of direct evidence; that is, evidence  
9 of eyewitness testimony as to the facts. So I am well aware  
10 of that case law.

11 All right. Mr. Franz, do you have any --

12 MR. FRANZ: Very briefly.

13 Three officers did not say the weapon was in the  
14 right hand. One officer said that over dispatch.

15 And the officer that said that introduced himself  
16 as Mary 12, which is Pieske, and Pieske, in his declaration,  
17 said, I am the one who made that statement.

18 We have calculated for you when that statement was  
19 made. That statement was made six minutes and two seconds  
20 after the shot.

21 If you calculate out through the BearCat, Pieske  
22 is going through the fence when he makes that statement. So  
23 the statement was made well after the shooting, and it's  
24 made by the driver driving through the fence. Why he said  
25 it they could have asked him in a deposition.

11:10:57 1 THE COURT: I think his point is the statement was  
2 that Mr. Babb was down, rifle in his right hand, and the  
3 photographs show the rifle a distance away from Mr. Babb's  
4 body, and he's citing that as a contradiction in the  
5 statement and the photographic evidence.

6 MR. FRANZ: Yes.

7 THE COURT: And from that contradiction, he's  
8 asserting that the jury can draw certain inferences.

9 And I get back to what you want this court to do,  
10 which is to decide this as a matter of law and not submit it  
11 to a jury.

12 And the evidence he's citing is circumstantial  
13 evidence that I just talked about that can support  
14 inferences, and it's entitled to equal weight to direct  
15 evidence.

16 And so what am I to do with that in terms of your  
17 motion for summary judgment? You want me to decide this as  
18 a matter of law.

19 MR. FRANZ: Well, I think the fact that the  
20 statement is made as Pieske is driving doesn't contradict  
21 the statement of Stutesman.

22 THE COURT: I am sorry?

23 MR. FRANZ: The statement by Pieske does not  
24 contradict the statement of Stutesman.

25 THE COURT: The statement being that the rifle is

11:12:14 1 in his right hand?

2 MR. FRANZ: That is inconsistent with his  
3 statement being on the front porch. I agree. But we have  
4 the BearCat video arriving at the same time the statement is  
5 made.

6 THE COURT: But the BearCat video doesn't show --  
7 I -- I am not following.

8 MR. FRANZ: Okay. So if you conclude -- if you  
9 conclude that's not a rifle on the BearCat video and that we  
10 haven't tied that in.

11 THE COURT: Well, I get back to that. Is that  
12 something I can conclude as a matter of law? And you seem  
13 to say it is.

14 MR. FRANZ: It is, combined with the photographs  
15 that Stutesman took.

16 THE COURT: Well, when you combine it with the  
17 photographs, aren't you asking me to engage in an  
18 inferential process drawing inferences, and isn't that the  
19 function and prerogative of a jury?

20 MR. FRANZ: Inferences from material facts that  
21 are not disputed.

22 THE COURT: Okay.

23 MR. FRANZ: And then as to the synchronization, it  
24 was explained by the officers that each video on each  
25 vehicle is not going to be synchronized with realtime. They

11:13:19 1 are all different. And that's why you will see the date  
2 stamps that appear.

3 You know, for example, if I just run the BearCat  
4 video, okay, that date stamp is not accurate. The date  
5 stamp on the ICV is not because they are not synchronized to  
6 realtime.

7 So the only way to get actual realtime, they are  
8 all being played in realtime. So you can take the elapsed  
9 time as being the realtime, not the date stamps. That's why  
10 we used -- and we have never said and we presented in a  
11 declaration that they are not synchronized. Otherwise we'd  
12 just use the date stamp.

13 Thank you.

14 THE COURT: Okay. Well, I want to observe the  
15 noted French historian de Tocqueville described in his  
16 sojourn through the United States when it was a young  
17 republic, he extolled the virtues of this country's jury  
18 system as being the foundation of Democracy. And I think  
19 he's very correct. It's a unique cornerstone of our form of  
20 government that calls in juries to decide important issues  
21 after a trial. And I bear that in mind as I approach the  
22 issues presented in this case.

23 We will allow the supplemental briefing, and the  
24 case will -- if either party requests additional oral  
25 argument in connection with the supplemental briefing, we

11:15:35 1 will reschedule that. If neither party requests  
2 supplemental argument, it will be taken under submission  
3 when the supplemental briefing is submitted, and the court  
4 will expedite its ruling on this case so that it can move  
5 forward.

6 Thank you.

7 MR. FRANZ: Your Honor, I have one more thing.

8 MR. ODIM: Thank you, Your Honor.

9 THE COURT: Yes.

10 MR. FRANZ: They have agreed that defendant Pieske  
11 and Grose can be dismissed. Can we do a limited judgment to  
12 get this off their record?

13 THE COURT: Any objection to that?

14 MR. ODIM: No objection.

15 THE COURT: All right. Then you can do that.  
16 Submit it for the court.

17 MR. FRANZ: Thank you.

18 THE COURT: Anything else?

19 MR. ODIM: Nothing from the plaintiff.

20 THE COURT: All right. Thank you.

21 MR. ODIM: Thank you.

22 THE COURT: Thank you for your presentations.

23 THE CLERK: This court is in recess.

24 *(The proceedings were concluded this*  
25 *18th day of January, 2019.)*

11:16:26 1 I hereby certify that the foregoing is a true and  
2 correct transcript of the oral proceedings had in the  
3 above-entitled matter, to the best of my skill and ability,  
4 dated this 24th day of April, 2019.

5  
6 /s/Kristi L. Anderson

7 Kristi L. Anderson, Certified Realtime Reporter  
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